

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1191
STATE OF WISCONSIN**

Cir. Ct. No. 2012CV2379

**IN COURT OF APPEALS
DISTRICT II**

CHRISTINE CHIALIVA,

PLAINTIFF-APPELLANT,

V.

CITY OF NEW BERLIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Stark, J.

¶1 PER CURIAM. Christine Chialiva sued the City of New Berlin to obtain the type of health insurance benefits she believed she was entitled to after she retired as a City of New Berlin police officer. The circuit court ruled against Chialiva, and she appeals from the order granting summary judgment to the City of New Berlin. We agree with the City that certain of Chialiva's appellate

arguments are waived because they were not raised in the circuit court. On the issues the circuit court was asked to address relating to Chialiva's right to health insurance, we affirm.

¶2 On summary judgment, the parties stipulated to the following facts. After being injured in the line of duty and sustaining a duty-related disability, Chialiva retired from the New Berlin police force on August 23, 1999. During Chialiva's employment and after her retirement, the City of New Berlin and the New Berlin Professional Police Association, Inc. were subject to collective bargaining agreements (CBA). At the time of Chialiva's retirement, the parties were subject to a CBA in effect from January 1, 1999 to December 31, 2000 (the 1999 CBA). For purposes of this appeal, the following 1999 CBA provisions are relevant:

Section 5.02 – Health Insurance: Employees may select single or family insurance coverage. Employees shall contribute fifteen dollars (\$15.00) per month toward the monthly premium with the balance to be paid by the City. The City has the right to change carriers for its standard health insurance plan provided the coverage is fundamentally equivalent to the health insurance standard established in section 5.03 of this agreement, and there is no lapse of coverage....

Section 5.03 – Health Insurance Standard Plan/Out-of-Pocket Costs: The City's standard health insurance program will be the Blue Cross/Blue Shield Tradition Plus PPO and non-PPO that was in effect on January 1, 1994, with a two-hundred dollar (\$200) per person, four hundred dollar (\$400) per family deductible, an 80%/20% co-insurance provision, and an annual out-of-pocket maximum payment of six hundred dollars (\$600) per person and twelve hundred dollars (\$1200) per family. The specific provisions of the Blue Cross/Blue Shield Tradition Plus plan are listed in the plan document initialed by both parties.

Section 5.04 – Insurance for Duty Related Disability Retirees: Employees who retire under the provisions of Wisconsin Statutes Section 40.65 shall be covered by the

City's health insurance plan with the entire premium to be paid by the City.

¶3 In her complaint, Chialiva sought relief from the health insurance premiums the City began imposing upon her in 2006 along with relief from the increased deductibles and out-of-pocket maximums she faced effective January 1, 2012.

¶4 The City filed a summary judgment motion. In its motion, the City argued that Chialiva's rights to health insurance as a duty-related disability retiree were governed by sec. 5.04 of the 1999 CBA. The City conceded that while sec. 5.04 required the City to pay Chialiva's entire insurance premium,¹ the 1999 CBA gave Chialiva no other rights vis-à-vis City health insurance.

¶5 In her cross motion for summary judgment, Chialiva recognized that the 1999 CBA did not contain any specific language addressing future changes to the amount and allocation of insurance and other health care costs. However, she argued that the City's imposition of deductibles and out-of-pocket expenses contrary to the figures set out in sec. 5.03 constituted a breach of contract and an impermissible change to the health insurance benefit described in sec. 5.02.²

¶6 The circuit court ruled in favor of the City. The court acknowledged Chialiva's arguments: the City had refused to pay all of her health insurance premiums and the City violated sec. 5.03 of the CBA when it imposed deductible

¹ Chialiva paid \$6618 in health insurance premiums. The City agreed to reimburse Chialiva for the premiums she paid.

² As discussed in paragraphs eight and nine of this opinion, Chialiva did not argue on summary judgment that she has the right to choose among available City health insurance plans or that she is entitled to be placed in an available City health insurance plan with lower costs to the insured.

and out-of-pocket expenses. The court noted the City's concession that it would reimburse Chialiva for health insurance premiums she paid.

¶7 The circuit court deemed the 1999 CBA clear and unambiguous. The court agreed with the City that sec. 5.04 controls and sets out the City's obligation to a duty-related disability retiree: the City's obligation is limited to paying the entire health insurance premium on the retiree's behalf. The court further concluded that the CBA does not contain any provision in which the City agreed to limit or pay any deductibles owed by a retiree or to limit a retiree's out-of-pocket health care expenses.

¶8 On appeal, Chialiva focuses on sec. 5.04's reference to "the City's health insurance plan." She argues that the phrase is undefined and therefore ambiguous, and she urges that the deductibles and out-of-pocket maximums in sec. 5.03 should apply. She also argues that she is aggrieved because the City offered her a health insurance plan with a higher deductible and out-of-pocket costs,³ and the City has declined to move her to a lower cost plan.

¶9 We agree with the City that Chialiva did not argue in the circuit court that she is aggrieved because the City offered her a higher deductible and out-of-pocket cost plan and the City has declined to move her to a lower cost plan. Chialiva did not ask the circuit court to decide these issues, and the circuit court did not decide these issues. We will not decide these issues for the first time on appeal. *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

³ We view this argument as distinct from Chialiva's argument, discussed in paragraphs twelve through fifteen of this opinion, that the costs in sec. 5.03 apply to her.

The scope of this appeal is confined to what the parties argued in the circuit court on summary judgment.

¶10 We review the circuit court’s grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The parties filed cross motions for summary judgment and submitted the case to the circuit court on stipulated facts. Therefore, the resolution of this appeal presents a question of law. *Friendship Vill. Milwaukee v. City of Milwaukee*, 181 Wis. 2d 207, 219, 511 N.W.2d 345 (Ct. App. 1993). Interpretation of a CBA also presents a question of law for this court. *Roth v. City of Glendale*, 2000 WI 100, ¶15, 237 Wis. 2d 173, 614 N.W.2d 467.

¶11 As discussed in footnote 1, there is no dispute that the City must pay Chialiva’s insurance premiums as provided in sec. 5.04. We address this issue no further.

¶12 We turn to Chialiva’s argument that sec. 5.04’s reference to “the City’s health insurance plan” is ambiguous and therefore the deductibles and out-of-pocket maximums expressed in sec. 5.03 of the 1999 CBA apply. The question is not whether sec. 5.04’s reference to “the City’s health insurance plan” is ambiguous. Rather, the inquiry question is: what is the extent of Chialiva’s health insurance rights under the CBA?

¶13 *Roth* recognizes that retirees may have vested rights to benefits. *Roth*, 237 Wis. 2d 173, ¶¶25-26. There is no dispute that Chialiva has vested rights to a health insurance benefit. This appeal concerns the scope of Chialiva’s vested rights under the 1999 CBA that granted those vested rights.

¶14 Chialiva conceded on summary judgment that the CBA “contains no specific language regarding any future changes to the amount or allocation of [insurance costs].” We conclude that sec. 5.04 unambiguously applies to duty-related disabled retirees and unambiguously states that a retiree is covered by the City’s health insurance plan. We agree with the circuit court that the CBA contains no provision in which the City agreed to limit or pay any deductibles owed by a duty-related disability retiree or limit that retiree’s future out-of-pocket health care expenses. The only CBA provision that indicates an ongoing, specific health insurance benefit to a duty-related disability retiree is sec. 5.04’s requirement that Chialiva shall be covered by the City’s health insurance plan for which she need not pay premiums.

¶15 Chialiva argues that the new deductible and out-of-pocket maximums imposed as of January 2012 exceeded those set out in sec. 5.03.⁴ This argument begs the question of whether the maximums set out in sec. 5.03 apply to Chialiva. Nothing in sec. 5.04 requires the City to offer, in perpetuity, the exact benefits set out in sec. 5.03 of the 1999 CBA. Nothing in sec. 5.04 indicates that sec. 5.02 or sec. 5.03 apply to duty-related disability retirees beyond the 1999 CBA period. Rather, these provisions describe the then-current City health insurance plan offered to active employees, provisions which contemplate change over time.

¶16 *Hussey v. Milwaukee Cnty.*, 740 F.3d 1139 (7th Cir. 2014), provides support for our conclusions about the scope of Chialiva’s vested health insurance

⁴ Chialiva argues that because sec. 5.03 applies, the City has fundamentally changed the standard health insurance program and violated sec. 5.02. We need not reach this issue because we conclude that sec. 5.03 does not apply.

rights. At the time Hussey retired as a Milwaukee county employee, the applicable county ordinance required the county to pay Hussey's entire insurance premium. *Id.* at 1141. After Hussey retired, the county changed its health insurance plans, carriers, and costs. *Id.* Thereafter, Hussey alleged that she was entitled to cost-free health insurance during her retirement. *Id.* at 1140. The county countered "that it only promised retirees the ability to participate in the same health insurance plan ... as active employees on a 'premium-free' basis." *Id.*

¶17 As the Seventh Circuit properly reasoned, before it could determine whether Hussey had lost a vested property right in insurance, the court had to determine "the exact nature of that right." *Id.* at 1143. In other words, was Hussey entitled to "premium-free" or "cost-free" health insurance? *Id.* The court concluded that "the County's promise to pay 'premiums' does not comprise a promise to pay all of the costs incurred by a retiree in obtaining health care." *Id.* at 1144. The court found that Hussey was not entitled to cost-free health insurance; Hussey was entitled to "premium-free" insurance. *Id.* at 1146. Hussey was entitled to participate in the health care insurance the County offered to active employees without having to pay a premium. *Id.*

¶18 We apply the rationale of *Hussey* to this case. Under the 1999 CBA, Chialiva is entitled to participate in the City's current health insurance plan offered to active employees without having to pay a premium.

¶19 We conclude that the circuit court properly drew the contours of Chialiva's right to health insurance as a duty-related disability retiree. Summary judgment to the City was appropriate.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2011-12).

